Supreme Court, U.S.
FILED
MAY 15 1998
CLERK

No. 97-1639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROBERT D. SPRAGUE, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RAYMOND C. FAY
Counsel of Record
CHRISTOPHER G. MACKARONIS
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners

May 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
I. MISSTATEMENTS IN THE OPPOSITION SHOULD NOT DETER GRANT OF THE PETITION	2
A. Respondent Has Misrepresented the Record Regarding "Underlying Plan Documents"	3
B. Respondent Has Misrepresented the Record Regarding the Early Retirement Agreements	5
C. Respondent Has Misrepresented the Course of the Proceedings Below	6
II. THE CIRCUITS ARE IN CONFLICT ON THE ISSUE OF VESTING UNDER ERISA SUMMARY PLAN DESCRIPTIONS	7
III. THE PETITION SHOULD BE GRANTED TO REVIEW THE ENFORCEABILITY OF BILATERAL CONTRACTS FOR HEALTH CARE UNDER ERISA	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Diehl v. Twin Disc, Inc., 102 F.3d 301 (7th Cir. 1996) 8
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) 9
Edwards v. State Farm Mut. Auto Ins. Co., 851 F.2d 134 (6th Cir. 1988) 9
Frahm v. Equitable Life Assurance Soc., 137 F.3d 955 (7th Cir. 1998) 10
Frito-Lay, Inc. v. Willoughby, 868 F.2d 1029 (D.C. Cir. 1988) 6
Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) 4
Helwig v. Kelsey-Hayes Co., 93 F.3d 243 (6th Cir. 1996), *cert. deneid*, 117 S. Ct. 690 (1997) 4
In re White Farm Equipment Co., 788 F.2d 1186 (6th Cir. 1988) 8
Jensen v. SIPCO, Inc., 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 9
Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir. 1985) 8
Weimer v. Kurz-Kasch, Inc., 773 F.2d 669 (6th Cir. 1985) 8
Wulf v. Quantum Chemical Corp., 26 F.3d 1368 (6th Cir. 1994) 8

Statutes and Regulations

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1022 5
29 U.S.C. § 1024 5

Respondent has filed an unseemly opposition in this extraordinary case concerning the vesting of ERISA welfare benefits in retirement. In a bold assault on this Court's rule that oppositions be stated briefly and plainly, respondents have swamped the Court with a prolix brief that exceeds the 7⅛ inch text field limitation and crams 20-line arguments into footnotes. Respondent misleads the Court with highly argumentative misstatements of fact, endless snippets of out-of-context quoted material, and repetitious conclusory mantras, adding a dose of invective as well.[1] It obfuscates matters in the hope that the Court will accept the conclusion that the case lacks "certworthiness" because it is "fact-bound," an unhelpful jargonistic description repeated at least six times in respondent's brief.[2] We respectfully urge the Court to cut through the bombast in the opposition and grant review on the important legal issues presented.

The two ERISA issues presented are not at all bound up in factual peculiarities that would lessen the application of a decision in this case to all future cases involving vesting of ERISA welfare benefits. Here each of the ERISA summary plan descriptions ("SPDs") explicitly promised that basic health care would be provided for life at GM's expense. Approximately 45,000 of the 84,000 salaried retirees retired between 1974 and 1985 under those SPDs containing no statement of a reservation of the right to change the plan, and those retiring after mid-1985 retired under an SPD containing a reservation of rights statement. The first issue turns on whether the express promise of lifetime health care without a reservation is itself sufficient to vest benefits, and whether the

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[1] "Invective directed at the opponent and epithets characterizing the arguments as frivolous are largely wasted. I think it is also a signal to the judges that you are in trouble. So I think it is counterproductive." Interview, *Litigation* (Winter 1997) at 24. Here respondent hurls "frivolous," and adds "fantasy" and "extravagant" for good measure.

[2] What is "fact-bound"? Article III of the Constitution requires all legal pronouncements to be "bound" to facts to one degree or another, and does not allow advisory opinions on purely legal issues.

matter is ambiguous in the presence of both types of statements. The rift in the courts of appeals is not over labels to be placed on these facts, but over the legal standards for vesting.

Similarly, the second ERISA issue concerning the early retirement agreements, though presented against the backdrop of a lengthy trial and detailed factual findings that respondent did not appeal, turns solely on the law. The Sixth Circuit held that the bilateral written contracts for early retirement benefits are not enforceable under ERISA because they did not meet the "written instrument" requirements for ERISA plans. Whether employees and employers can contract for benefits under ERISA apart from the regular plan and without all the trappings of a complete ERISA plan document is an important question that affects millions of ERISA participants and their employers who enter into benefit agreements of all levels of formality.[3]

I. MISSTATEMENTS IN THE OPPOSITION SHOULD NOT DETER GRANT OF THE PETITION.

Space does not permit us to respond to all of respondent's misstatements, and undeniably that suits its strategy. We respond in three key areas.[4]

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[3] Respondent italicizes its argument that the petition should be denied because the Sixth Circuit did not express disagreement with decisions from other courts (Opp. 10, 15). The fact that the Sixth Circuit chose not to acknowledge conflicts does nothing to diminish these conflicts. If anything, the Sixth Circuit's approach compels even closer scrutiny to appreciate the wide swath cut through ERISA precedents by the lower court's decision.

[4] A fourth area of misrepresentation, though irrelevant to the legal issues in the petition, is greatly emphasized in the opposition in the hope that the Court will believe that no harm has befallen the GM salaried retirees because of the changes made. Without any citation to the record, respondent asserts that its plan is "generous." It also states that petitioners make only "modest" contributions (Opp. 4-5). However, the initial changes have been eclipsed by much greater subsequent changes, including annual out-of-pocket expenses up to $5,000 (Pet. 4). Respondent does not mention that it has piled on unprecedented monthly "premiums" (A. 216a), and changes in Medicare coordination rules which have significantly

A. Respondent Has Misrepresented the Record Regarding "Underlying Plan Documents."

Because every facet of the Sixth Circuit's decision is premised on the holding that respondent unambiguously reserved the right to change its salaried health care plan in underlying plan documents, petitioners pointed out that neither the district court nor the court of appeals referred to any reservation of rights language in the pre-1985 insurance documents (Pet. 6).

Respondent asserts not only that reservations of rights to amend were included in insurance certificates, policies, and riders (Opp. 2, 3), but that these materials were distributed to "all covered employees" (Opp. 3), fostering the impression that all salaried employees of General Motors regularly received insurance certificates containing a reservation of rights.

These assertions are false. First, the certificates referred to by respondent are certificates from the Metropolitan Life Insurance Company. Metropolitan coverage was limited geographically (*e.g.*, Tr. Ex. 518 at 2543, R 433, six states), so clearly the certificates were not distributed to all salaried employees.[5] The Metropolitan Group policy (Tr. Ex. 509, R 433, 435) and the various Metropolitan certificates of insurance (*e.g.*, Tr. Exs. 514-516, 518, 519, R 433, 435) with one exception stated that coverage would continue through the life of the surviving spouse at no cost. No reservation of rights language appeared in these certificates. Rather, the reservation of rights language that respondent refers to appears in pre-

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increased the burden on salaried retirees (Tr. Ex. 35 at 12-15, R. 433). And, of course, the objective of GM's defense of the lawsuit has been to win the right to eliminate health care coverage altogether (A. 53a) (Martin, C.J.).

[5] The larger carrier was Blue Cross/Blue Shield. In the summary judgment proceedings in *Sprague I*, respondent produced only one Blue Cross/Blue Shield certificate out of dozens of local Blue Cross plans, and that certificate had no reservation of rights language in it (Tr. Ex. 531, R. 433, 435). Later, a smattering of other certificates was produced.

ERISA *summaries*, not in the Metropolitan certificates themselves. The appearance of a reservation in a pre-ERISA summary is a far different matter, factually and legally, from a reservation in an underlying plan document. The Sixth Circuit panel correctly recognized that pre-ERISA summaries "do not have the same effect as official summary plan descriptions" (A. 74a), and the full Sixth Circuit did not express disagreement with that proposition.

Respondent suggests that SPDs containing lifetime promises but no reservations are ineffective because they cross-reference the insurance certificates as governing (Opp. 3). Neither the district court nor the court of appeals embraced respondent's cross-reference argument.[6]

Respondent points to the standard general termination clause in the Metropolitan Group Policy (Opp. 2). Respondent argued this point below and neither the district court nor the court of appeals accepted it.[7]

Respondent also misrepresents the record with regard to the 1985 "draft" plan. Respondent asserts that the document "explained" that it applied to salaried employees, when in fact the document throughout dealt with "hourly" employees and referred to "salaried employees" only once—on the slip-sheeted cover page marked "draft" (*id.*).[8]

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[6] Giving effect to such cross-references would "wholly undermine the rule that statements of the summary plan description are binding." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991).

[7] Moreover, the Sixth Circuit in *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997), rejected reliance on such clauses, stating they "were included merely to reserve the right of the employer or the carrier to end their commercial relationship." The Sixth Circuit did not disavow that reasoning in the *en banc* decision below.

[8] Not only did respondent neither distribute nor acknowledge the existence of the 1985 "draft" (Pet. 6), GM counsel in this case did not identify the draft as being among the plan documents in response to a formal ERISA request made prior to the lawsuit (R. 69, Exs. 23, 28). The filing of the document in an unidentified Internal

B. Respondent Has Misrepresented the Record Regarding the Early Retirement Agreements.

Respondent deliberately distorts the detailed, unappealed findings of the district court in *Sprague II*. Those findings speak for themselves, but several corrections to respondent's misstatements are in order.

First, respondent no fewer than 19 times in its brief refers to the early retirement contracts as "informal" communications, when it was established at trial that the early retirement agreements and benefit explanations all constituted authorized communications of GM (A. 214a, 215a). The early retirement agreements were authorized as part of corporate downsizing programs that were directed and approved at the highest levels of the corporation (A. 128a-136a).

Second, respondent implies that some of the contracts were oral, and argues that petitioners advocated an oral modification of the GM salaried health care plan (Opp. 24-25). Respondents purposely confuse the legitimate admissibility of written and oral extrinsic evidence to construe the meaning of ERISA contracts, as occurred in this case (A. 196a-199a), with the question of whether written plan documents can be modified orally, a question that is not presented here at all.

In a most misleading elision of the Sixth Circuit opinion, respondent asserts (Opp. 25 n.13) that the early retirement agreements had nothing to do with health care, but referred only to pension benefits. This was one of the most hotly contested issues at trial. It was determined on extensive unappealed findings that the early retirement agreements did include health care (A. 202a-203a).

In another attempt by respondent to cheapen the early retirement agreements as "informal," respondent asserts that they were "highly abbreviated statements" of "a few sentences or phrases" (Opp. 26). Similarly, respondent

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Revenue proceeding (Opp. 29 n.14) has no relevance here. ERISA plan documents are filed with the Department of Labor. 29 U.S.C. § 1022, 1024.

attempts to recast entirely the contents of the benefit explanations provided to early retirees by stating that they were "extraordinarily diverse," and by incompletely and disparagingly characterizing their contents (Opp. 13). These characterizations stand in contrast to the uncontested findings in *Sprague II* that virtually all of the benefit explanations spoke both to the "lifetime" and "no cost" aspects (*see* Pet. 8).

The early retirement agreements and benefit explanations varied in length. Some were brief, but others ranged up to dozens of pages (Pet. 4). The purpose of the trial was to determine the meaning of the benefit explanations, and that determination was made in favor of the early retirees. Respondent selectively refers to trial evidence in its favor, including the rare occasion on which a plant closing document contained a reservation of rights statement (Opp. 6). Notwithstanding respondent's "incivil" one-sided recitation,[9] the evidence at trial was overwhelmingly in the early retirees' favor.

C. Respondent Has Misrepresented the Course of the Proceedings Below.

The general plan issues in *Sprague I* were decided on a summary judgment record. Appellate review in the Sixth Circuit of those issues necessarily was confined to the summary judgment record. *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1035-36 (D.C. Cir. 1988). By contrast, the bilateral contract claims of the early retirees were tried to the district court, and appellate review of the *Sprague II* and *Sprague III* decisions was based on the trial record.

Respondent misleads the Court in two respects. First, respondent deceptively jumbles the citations to the trial record and the summary judgment record. Second, respondent states that the court of appeals engaged in simple "fact finding" (*e.g.*, Opp. 16 n.4) and determined the early retirement agreement issues "as a matter of fact"

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[9] *See* Interview, *supra*, at 25 (briefs that treat the facts "in a completely one-sided fashion" are "analogous to incivility").

(Supp. Opp. 2, 3). Although the court of appeals reviewed the issues in *Sprague I de novo*, it did not review alleged factual errors in the district court's extensive unappealed findings in *Sprague II* or *III*. Therefore, the court's determinations as to the early retirement agreements must be viewed strictly as a matter of law.

Respondent irresponsibly argues that petitioners waived the threshold claim of the lawsuit that respondent had no underlying plan or plan amendment procedures in compliance with ERISA's "written instrument" requirements (Opp. 29 n.14). No waiver occurred. The parties entered into a post-trial stipulation to reflect their agreement that the case was final for review, which merely recited that the district court already had disposed of the claim in *Sprague I* (R. 360; *see* A. 89a).[10]

II. THE CIRCUITS ARE IN CONFLICT ON THE ISSUE OF VESTING UNDER ERISA SUMMARY PLAN DESCRIPTIONS.

Respondent attempts to sidestep the deep split in the circuits on the issue of vesting under ERISA SPDs by two arguments: (1) all ERISA cases involving collectively bargained ERISA benefits are irrelevant; and (2) all ERISA cases addressing plan ambiguities are irrelevant because the Sixth Circuit here declared the underlying plan to be unambiguous in respondent's favor. Significantly, respondent's argument necessarily concedes that there is a conflict in the circuits, if the premises of respondent's argument are wrong. Respondent's argument is incorrect in both respects.

First, respondent has not cited any provision in ERISA or to a single case holding that the standards for vesting of ERISA welfare benefits are different for collectively bargained benefits than they are for salaried or non-union

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[10] The threshold plan issues were briefed extensively on appeal (P. CA Br. 12-14, 28-32, 35-37; P. CA 2d Br. 41-42), and no assertion of waiver was made. The panel decision and the *en banc* dissent both addressed the threshold plan issues (A. 78a; A. 40a-41a).

benefits. The bare recital in some opinions that the courts were dealing with collectively bargained benefits (Opp. 18-19) adds nothing to the mix. Indeed, the Sixth Circuit itself has held that the standard for ERISA welfare benefit vesting is the same for collectively bargained as well as non-collectively bargained benefits. *See In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1988), (in construing a non-bargained welfare plan, "courts may draw inferences or make presumptions as this court has done in construing collective bargaining agreements providing welfare benefit plans").

Second, the conflict in the circuits does not evaporate by respondent's endless repetition of the Sixth Circuit's conclusion that the plan was unambiguous in GM's favor. The matter before the Court is precisely whether the GM plan is unambiguous (and in whose favor), or ambiguous. Those questions are questions of law. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 671 (6th Cir. 1985). Plan language "is ambiguous if it is subject to two reasonable interpretations." *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1376 (6th Cir. 1994).

Here, each of the SPDs contained statements such as "Your basic health care coverages will be provided at GM's expense for your lifetime" (Pet. 5). The determination of whether or not that language vests benefits, either in the presence or the absence of reservation language, is a legal matter. *See Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 306 (7th Cir. 1996) (under ordinary rules of contract construction, "entitled for the lifetime of the pensioner . . . to the . . . benefit coverages . . . of the Insurance Agreement" "must mean what it says: the retired employees *shall* be entitled to welfare benefits for their lifetime"); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986) ("during the life of the pensioner at no cost to the pensioner" "clearly means that a pensioner will receive health benefits for the remainder of his life"). It is because of the disagreement among the courts of appeals

on how to interpret vesting language that the petition should be granted (*see* Pet. 12-16).

In similar vein, the conflict in the circuits concerning the application of the principle in *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (Pet. 13), is not resolved by the conclusion that an explicit promise of lifetime benefits with *no* reservation in an SPD constitutes "silence" on the vesting question (A. 21a). In *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), cited by the court below, vesting was determined under *ambiguous* plan documents but not under the SPDs. The promissory language in the GM SPDs would have been sufficient to confer vesting and would not have constituted "silence" under that decision.[11]

III. THE PETITION SHOULD BE GRANTED TO REVIEW THE ENFORCEABILITY OF BILATERAL CONTRACTS FOR HEALTH CARE UNDER ERISA.

Most of respondent's opposition with regard to the early retirement agreement issue dissolves upon an appreciation of its factual misstatements (*see* Section I, *supra*). What remains is the important question of whether bilateral agreements are enforceable under ERISA as a matter of law.

The Sixth Circuit held that such agreements are enforceable only if they contain all, or virtually all, of ERISA's "written instrument" requirements (A. 25a) ("documents that do not satisfy ERISA's requirements for plan documents do not qualify as ERISA plan documents").

While respondent concedes that *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), states the test for determining if an arrangement is an ERISA plan, it attempts to limit the application of *Dillingham* to instances where

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[11] Inasmuch as the Sixth Circuit referred to Department of Labor regulations on summary plan descriptions as a reason for virtually abandoning the *Edwards* principle (A. 22a; *see* A. 30a), we respectfully suggest that the Court would be assisted by inviting the views of the United States. The Department of Labor participated below (*see* Pet. 18 n.4).

there is also not a more general plan (Opp. 27). No case announces this narrow restriction of the *Dillingham* principle.

Respondent relies on the statement in *Frahm v. Equitable Life Assurance Soc.*, 137 F.3d 955, 958 (7th Cir. 1998), that the Sixth Circuit here "did not deny" that "bilateral contracts about welfare benefits are possible" (Opp. 24). In *Frahm*, the court believed that, as a logical extension of the federal common law, bilateral contracts must be in writing to be enforced (as were all 50,000 early retirement agreements here). 137 F.3d at 958. But there is a great deal of difference between saying that ERISA contracts must be in writing and rejecting written contracts, as the Sixth Circuit did, because the employer chose not to comply with ERISA's written instrument requirements. Thus, the issue remains whether bilateral contracts for ERISA benefits are enforceable, in the words of the district court, "apart from [the] regular plan" (A. 237a). No other court, including the Seventh Circuit, would strip the protections of ERISA from benefit contracts that do not comply with all of ERISA's written instrument requirements.[12]

CONCLUSION

Petitioners respectfully pray that the petition be granted.

Respectfully submitted,

RAYMOND C. FAY
Counsel of Record
CHRISTOPHER G. MACKARONIS
BELL, BOYD & LLOYD
1615 L Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 466-6300
Counsel for Petitioners

Dated: May 1998

[12] The petition should also be granted with respect to the class action issue. Contrary to respondent's argument, the practical importance of the class action ruling below is magnified because of the importance of the other issues presented in the petition.